



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP/145574

PRELIMINARY RECITALS

Pursuant to a petition filed November 27, 2012, under Wis. Admin. Code § DHS 10.55, to review a decision by the Care Wisconsin in regard to Medical Assistance, a hearing was held on January 22, 2013, at West Bend, Wisconsin.

The issues for determination are 1) whether the case management organization (CMO) met its burden to show that it correctly discontinued Petitioner's day treatment services with a specific provider and 2) whether the Division of Hearings and Appeals has legal authority to review the termination of the contract by the CMO with that provider.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By: Joanne Geidel, Care Manager
Care Wisconsin
2802 International Lane
PO Box 14017
Madison, WI 53708-0017

ADMINISTRATIVE LAW JUDGE:

Michael A. Greene
Division of Hearings and Appeals

NOTE: Due to staffing issues, ALJ Greene was unable to write this decision. This decision was written by ALJ Kelly Cochrane, on ALJ Greene's behalf. This decision is based upon the record created at the hearing.

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Washington County. She lives in an adult family home (AFH) with a staff to resident ratio of 1:4.
2. Petitioner is a Family Care Program (FCP) participant. One of the services in place for her was day center treatment services at Our Place Day Services. The ratio of staff to client at Our Place was 1:4. This service was authorized by her CMO through the use of the Resource Allocation Decision (RAD) in March 2012.
3. At some point thereafter the CMO performed an internal audit which caused it to look at the ratios, or levels of support, a member needs at day center treatment facilities. The CMO then drafted its "Day Center/Treatment Guideline" (DCT) on or about October 15, 2012. See Exhibit 5.
4. On November 9, 2012 petitioner's Care Manager (CM) used the RAD once again to determine if petitioner's day center services at Our Place should continue. The CM used the DCT in conjunction with the RAD. This time it was determined that petitioner did not need the 1:4 staffing ratio, and that her support needs could be met with a provider with a 1:8 ratio. See Exhibit 2.
5. Petitioner was sent a notice dated November 13, 2012 that informed her that her day treatment services at Our Place were to be discontinued effective November 30, 2012. The reason for the discontinuance was that the CMO concluded that petitioner did not need the 1:4 staffing ratio, and that her support needs could be met with a provider with a 1:8 ratio based on the scoring she received under the DCT. See Exhibit 1.
6. Petitioner filed an appeal with the Division of Hearings and Appeals on November 27, 2012 to contest the discontinuance of the Our Place services. The Division of Hearings and Appeals ordered that Petitioner's Our Place benefits be continued pending a decision in this matter.
7. Petitioner is diagnosed with mild mental retardation, obsessive compulsive disorder, organic mood syndrome, acne, dysmenorrhea, mild depressions, bilateral physiologic hand tremors occasional. Petitioner has a history of febrile seizures. She does take medications; two of which are for her seizures and depression.
8. Petitioner requires assistance with bathing: turning on shower and regulating water temperature, washing her body and hair, shaving, and verbal cueing. Petitioner does use a shower chair and grab bars. Petitioner requires assistance with dressing: verbal cueing for appropriate clothing, buttons and zippers (due to her tremors), and tying shoes. Petitioner requires assistance with eating: AFH staff cut her food (due to her tremors) and provide verbal cueing to slow down while eating. Petitioner requires assistance with toileting: requires reminders to wipe herself thoroughly and properly, to wash her hands after, and to flush the toilet. She uses a grab bar. Petitioner requires assistance with meal preparation: she requires frequent cues with every meal. Petitioner requires daily assistance with medication management as she needs someone to administer them to her. Petitioner requires assistance with money management as she does not recognize monetary denominations and has a representative payee. Petitioner does help with chores but requires assistance with laundry. Petitioner can use the phone but needs AFH staff to give her the number to dial as she does not remember numbers. Petitioner does work 2 days per week at a restaurant as a greeter and bussing tables, and has a job coach available to her. Petitioner can communicate her basic needs to others, but has difficulty in two-way conversation involving abstract ideas, concepts or feelings, has short term memory loss, has difficulty staying focused, has difficulty with multi-step tasks, and needs help with daily reminders, planning, or adjusting a routine, even if it is familiar. Her mental health and behaviors were most recently addressed in March 2012 when her doctor increased her Prozac because her behavior issues of becoming

obsessive, sneaking, stealing, lying and yelling. Those behaviors have stabilized since that time. See Exhibit 2 and 3. It was undisputed that petitioner is usually a very pleasant, happy person.

9. On January 3, 2013 the CMO sent a letter to Our Place indicating that the CMO was terminating its contract with Our Place Day Services, LLC effective March 5, 2013. The CMO indicated they were not satisfied with the performance of Our Place Day Services. See Exhibit 6.

DISCUSSION

The Division of Hearings and Appeals can only exercise authority that has been delegated to it. With respect to Family Care the Wisconsin Administrative Code delegates hearing authority where the appeal is directly to the Division of Hearings and Appeals as follows:

...

- (a) Denial of eligibility under s. DHS 10.31 (6) or 10.32 (4).
- (b) Determination of cost sharing requirements under s. DHS 10.34.
- (c) Determination of entitlement under s. DHS 10.36.
- (d) Failure of a CMO to provide timely services and support items that are included in the plan of care.
- (e) Reduction of services or support items in the enrollee's individualized service plan, except in accordance with a change agreed to by the enrollee.
- (f) An individualized service plan that is unacceptable to the enrollee because any of the following apply:
 1. The plan is contrary to an enrollee's wishes insofar as it requires the enrollee to live in a place that is unacceptable to the enrollee.
 2. The plan does not provide sufficient care, treatment or support to meet the enrollee's needs and identified family care outcomes.
 3. The plan requires the enrollee to accept care, treatment or support items that are unnecessarily restrictive or unwanted by the enrollee.
- (g) Termination of the family care benefit or involuntary disenrollment from a CMO.
- (h) Determinations of protection of income and resources of a couple for maintenance of a community spouse under s. DHS 10.35 to the extent a hearing would be available under s. 49.455 (8) (a), Stats.
- (i) Recovery of incorrectly paid family care benefit payments as provided under s. DHS 108.03 (3).
- (j) Hardship waivers, as provided in s. DHS 108.02 (12) (e), and placement of liens as provided in ch. HA 3.
- (k) Determination of temporary ineligibility for the family care benefit resulting from divestment of assets under s. DHS 10.32 (1) (i).

...

Wis. Admin. Code, §DHS 10.55(1); also see Wis. Stats., §46.287.

It is clear that the discontinuance of petitioner's day center services does fall within the legal authority of the Division of Hearings and Appeals. It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. *State v. Hanson*, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). The court in *Hanson* stated that the policy behind this principle is to assign the burden to the party seeking to change a present state of affairs. In this case, the CMO has the burden to show that the discontinuance of the day center services was correct.

Essentially, the only thing that has changed since the CMO authorized the day center services in March 2012 is that it developed the DCT in October and used it in November to score the petitioner to see what kind of ratio she warranted. I also add that the various case notes throughout the CMO's files indicates

that the staff at her AFH and petitioner's mother reported - well before they would find out that the services would be cut - that petitioner was changing by responding positively to the day center services at Our Place and that she was happier than they had seen in a long time. Therefore, I turn to the use of the DCT.

The Standard Contract (Contract) between the Department of Health Services and the CMOs provides significant detail as to how CMOs manage their FCP responsibilities. See *Standard Contract* at <http://www.dhs.wisconsin.gov/mltc/2013/2012Contract.htm>. In relevant part here, the petitioner rightly raises the issue of the use of the DCT as an allowable service authorization policy. The Contract provides at Article V:

K. Service Authorization

1. Service Authorization Policies and Procedures

- a. Services in the Long-Term Care Benefit Package
The MCO may use the Resource Allocation Decision Method (RAD) as its service authorization policy. If the MCO does not use the RAD, it must seek Department approval of alternative service authorization policies and procedures. The policies and procedures must address how new and continuing authorizations of services are approved and denied. The MCO may choose to create decision-making guidelines for more frequently used items and/or services. When the MCO wishes to utilize these guidelines as part of the RAD or alternative service authorization documentation (instead of documenting evidence), the guidelines must be approved by the Department.
- b. ...
- c. Procedures
The MCO's service authorization policies and procedures shall be submitted to the Department for approval prior to implementation, whenever a change occurs, and upon request. In addition, the MCO must submit any decision-making guidelines referenced in section 1.a. above to the Department for approval prior to implementation. IDT staff shall use the MCO's approved standardized service authorization policies, procedures and guidelines, as applicable. The MCO's approved service authorization policies and procedures may address the provision of supports or services that are not specified in the benefit package. The MCO must have in effect mechanisms to ensure consistent applications of review criteria for authorization decisions; and consult with the requesting provider when appropriate.

The petitioner raised the use of the DCT Guideline as improper here because the CMO did not get approval from the Department prior to its implementation. The CMO did not rebut this presumption at hearing. Additionally, the CMO did not provide the DCT to show how it even scored petitioner; rather petitioner's mother explained the CMO's scoring at hearing and compared it to her own use of the DCT and her scoring. Her scoring is more supported by the evidence here even if I found the use of the DCT proper. Petitioner's need for assistance, cueing and reminders is replete throughout her Case Notes, AFH notes, Functional Screen, and direct testimony of her AFH staff and mother. Her doctor also wrote in support of a 1:4 ratio for petitioner due to her severe anxiety. See Exhibit 7. Further, it was undisputed that petitioner's outcomes were being met, and she was changing for the positive with the day services she was receiving. According to the DCT, someone who requires a staff ratio of 1:8 is someone who requires brief, intermittent visual and/or verbal prompts; someone who requires a staff ratio of 1:4 is someone who consistently requires visual and/or verbal prompts. Exhibit 5. True, petitioner seems to be managing by getting to her restaurant job by way of a shared ride taxi and performing her job duties as a busser and greeter for about 2 hours, and that she can do that in a less than 1:4 setting. However, the

record does show that there are some issues there with other staff and management, issues with some of her behaviors, and her hours have been cut - which evidences it may not be going as smoothly as the CMO thinks it is. Unfortunately any progress notes from her job coach were not part of the record. In sum, based on the evidence before me, I cannot find that the CMO has met its burden to show that it acted correctly here. I am, therefore, directing that petitioner's Our Place services continue to March 4, 2013. Continuing Petitioner's Our Place services beyond March 4, 2013 brings us to the second issue.

On January 3, 2013 the CMO sent a letter to Our Place indicating that the CMO was terminating its contract with Our Place Day Services, LLC effective March 5, 2013. The CMO indicated they were not satisfied with the performance of Our Place Day Services. See Exhibit 6. The Contract directs communication between the CMO and the Department as to contracting and subcontracting for services. There is no delegation of authority to the Division of Hearings and Appeals as to the issue of the termination of the contract between the CMO and Our Place Day Services, LLC. See *Standard Contract*, §VIII. Further, petitioner has not pointed to any law or rule or Contract provision that indicates that Division of Hearings and Appeals possesses such authority. I do note that CMOs have to notify the Department if a contract is terminated and, if the Department finds that member's access to care is compromised, the Department has remedies available under the contract. See *Contract* at §VIII, L and §XVI, D. This suggests that the terminated provider and/or its consumers may contact the Department directly but, again, there is no authority delegated to the Division of Hearings and Appeals as to this issue.

I add that the effective date of the termination of the contract with Our Place was stated to be March 5. I therefore have continued services through March 4, assuming that the contract would not cover those services on March 5. If this is in error, and March 5 was still a date that the CMO was contracted with Our Place, I would continue the services to March 5. Therefore the Order reflects this.

CONCLUSIONS OF LAW

1. That CMO has not met its burden to show that petitioner's day services at Our Place should be discontinued effective November 30, 2012.
2. That the Division of Hearings and Appeals does not have authority to act as to the issue of the termination of the contract between the CMO and Our Place Day Services, LLC.

THEREFORE, it is

ORDERED

That this matter is remanded to the case management organization with instructions to take the steps necessary to continue Petitioner's benefits with Our Place Day Services, LLC. through March 4 or 5, 2013, whichever date correctly reflects the end date of the contract between the parties.

In all other respects this appeal is dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as

"PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 21st day of March, 2013

\sKelly Cochrane for Michael A. Greene
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on March 21, 2013.

Care Wisconsin
Office of Family Care Expansion